



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

April 27, 2021 Government Records Council Meeting

Jennifer Bondarew
Complainant

Complaint No. 2020-54

v.

Township of Howell (Monmouth)
Custodian of Record

At the April 27, 2021 public meeting, the Government Records Council ("Council") considered the April 20, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to provide a specific lawful basis denying access to the responsive e-mails, her response to the Complainant's OPRA request was insufficient. N.J.S.A. 47:1A-5(g).
2. The GRC must conduct an *in camera* review of the twelve (12) e-mail chains responsive to the Complainant's OPRA request to validate the Custodian's assertion that the records were exempt from disclosure under the attorney-client privilege and "inter-agency or intra-agency advisory, consultative, or deliberative material" exemptions. See *Paff v. N.J. Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
3. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 27th Day of April 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: April 28, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 27, 2021 Council Meeting**

**Jennifer Bondarew¹
Complainant**

GRC Complaint No. 2020-54

v.

**Township of Howell (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via pickup of all e-mails from Township of Howell (“Township”) official Tom Savino regarding the Complainant’s last name and a specific block and lot from 2007 to present.³

Custodian of Record: Donna Belton
Request Received by Custodian: February 3, 2020
Response Made by Custodian: February 6, 2020
GRC Complaint Received: February 27, 2020

Background⁴

Request and Response:

On February 2, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 6, 2020, the Custodian responded in writing obtaining an extension of time to respond through February 26, 2020 due to the size of the request and the possibility for assessment of a special service charge. On February 7, 2020, the Complainant asked if the Township could produce the records on a compact disc. The Custodian responded stating that it would be “no problem.”

On February 19, 2020, the Custodian responded disclosing multiple e-mails to the Complainant. The Custodian noted that “some e-mails . . . were not released that were privileged.” On February 21, 2020, the Complainant e-mailed the Custodian seeking clarification on the e-mails withheld from disclosure. The Custodian responded advising that she would provide a privilege log. The Complainant replied advising that there was “no need to create a log” because she was filing a complaint.

¹ No legal representation listed on record.

² Represented by Caitlin Harney, Esq., of Gluck, Walrath, LLP. (Freehold, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On February 27, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian withheld access to several e-mails without providing a specific lawful basis for her denial. The Complainant contended that the denial appeared to be a “cover-up of wrongdoing due to an ongoing land dispute.” The Complainant asserted that she submitted the subject OPRA request to identify the individual(s) responsible for delaying this dispute to her financial detriment. The Complainant thus contended that even if the Township ultimately disclosed the withheld records, she would not believe that this response would comprise all responsive e-mails without a third party witnessing the transaction.

Statement of Information:⁵

On September 15, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on February 3, 2020. The Custodian certified that her search included asking the Township’s Information Technology Department to perform a search for responsive e-mails. The Custodian certified that certified that following an extension of time, she responded in writing on February 19, 2020 granting access in part and denying access in part.

The Custodian argued that she lawfully denied access to twelve (12)⁶ separate e-mail chains under the attorney-client privilege exemption. N.J.S.A. 47:1A-1.1. State v. Sanders, 260 N.J. Super. 491, 497 (App. Div. 1992); Wargacki v. Cnty. of Bergen, GRC Complaint No. 2011-198 (January 2013). The Custodian contended that each e-mail comprised of communications between the Township and its attorney seeking legal advice and interpretation on multiple issues. The Custodian noted that in at least one of the responsive records, a Township staff member directly invoked the attorney-client privilege exemption.

The Custodian further argued that some of the responsive e-mails also fell within the “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 280 (2009). The Custodian argued that those applicable e-mails contained consultative and deliberative discussions related to the resolution of an easement issue.

⁵ On March 17, 2020, this complaint was referred to mediation. On July 15, 2020, this complaint was referred back to the GRC for adjudication.

⁶ The Custodian included a description of actions that occurred while this complaint was in mediation. The GRC notes that pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 *et seq.*, communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications that occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative, or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

Analysis

Sufficiency of Response

OPRA provides that if a “custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor . . .* on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g) (emphasis added). A custodian’s failure to do so results in an insufficient response and a violation of OPRA. See Schwarz v. N.J. Dep’t of Human Serv., GRC Complaint No. 2004-60 (February 2005) (setting forth the proposition that specific citations to the law that allows a denial of access are required at the time of the denial); Renna v. Union Cnty. Improvement Auth., GRC Complaint No. 2008-86 (May 2010) (noting that N.J.S.A. 47:1A-5(g) requires a custodian of record to indicate the specific basis for noncompliance).

Here, the Custodian denied access to multiple e-mail chains stating that they were “privileged.” Factually, there are no exemptions in OPRA that allow for such a denial. Although the Custodian subsequently offered to provide a privilege log to Complainant, she had already failed to include any specific lawful basis for this denial at the time of her denial. Thus, the forgoing evidence of record here supports a finding that the Custodian’s response was insufficient.

Accordingly, because the Custodian failed to provide a specific lawful basis denying access to the responsive e-mails, her response to the Complainant’s OPRA request was insufficient. N.J.S.A. 47:1A-5(g).

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁷ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court stated that:

[OPRA] also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’

⁷ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the Court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

Here, the Custodian denied access to twelve (12) e-mail chains. The Custodian argued in the SOI that the records were exempt from disclosure under the attorney-client privilege and ACD exemptions. N.J.S.A. 47:1A-1.1. However, a “meaningful review” is necessary to determine whether the denied e-mail chains fall within the asserted exemptions. Further, the GRC has routinely reviewed e-mails *in camera* in complaints with facts like the present complaint. See e.g. Pouliot v. N.J. Dep’t of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017). Thus, the GRC must review same to determine the full applicability of the cited exemptions.

Therefore, the GRC must conduct an *in camera* review of the twelve (12) e-mail chains responsive to the Complainant’s OPRA request to validate the Custodian’s assertion that the records were exempt from disclosure under the attorney-client privilege and ACD material exemptions. See Paff, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to provide a specific lawful basis denying access to the responsive e-mails, her response to the Complainant’s OPRA request was insufficient. N.J.S.A. 47:1A-5(g).
2. The GRC must conduct an *in camera* review of the twelve (12) e-mail chains responsive to the Complainant’s OPRA request to validate the Custodian’s assertion

that the records were exempt from disclosure under the attorney-client privilege and “inter-agency or intra-agency advisory, consultative, or deliberative material” exemptions. See *Paff v. N.J. Dep’t of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.

3. **The Custodian shall deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,¹⁰ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Prepared By: Frank F. Caruso
Executive Director

April 20, 2021

⁸ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

⁹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."